Filed 8/9/16 Lewin v. Goldman Sachs Mortgage Co. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROBERT S. LEWIN, Plaintiff and Appellant, v. GOLDMAN SACHS MORTGAGE CO. et al., Defendants and Respondents.	E062115 (Super.Ct.No. RIC1210554) OPINION

APPEAL from the Superior Court of Riverside County. David E. Gregory, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Robert S. Lewin, Plaintiff and Appellant in pro. per.

Houser & Allison, Eric D. Houser, Nicole M. Johnson and Robert W. Norman Jr., for Defendants and Respondents.

In 2005, Robert S. Lewin took out a loan secured by a trust deed on his house. Both the note and the trust deed contained attorney fee provisions. Goldman Sachs

Mortgage Co. (Goldman) is the successor in interest to the original lender. Ocwen Loan Servicing, LLC (Ocwen) is Goldman's servicing agent.

When the loan went into default, Lewin filed this action against Goldman and Ocwen (collectively defendants). He alleged that in 2012, defendants entered into a contract to sell the note and trust deed to a third party for a discounted amount; he sought specific performance of that alleged contract. The trial court entered judgment against Lewin and in favor of defendants.

Defendants then filed a motion for attorney fees, based on the attorney fee provisions in the note and in the trust deed. In opposition to the motion, Lewin pointed out that he had sued on an alleged subsequent contract, which did not have an attorney fee provision. The trial court nevertheless granted the motion and awarded defendants $95,637.50 in attorney fees.

Lewin appeals from the order awarding attorney fees. We will hold that defendants were not entitled to attorney fees because this was not an action on a contract containing an attorney fee provision. Accordingly, we will reverse.

I

FACTUAL BACKGROUND

In June 2005, Lewin took out a loan for $528,100, secured by his home in Temecula. Accordingly, he executed both a note and a trust deed.

The note included an attorney fee provision, which stated: "The Lender will have the right to be paid back by me for all of its costs and expenses in enforcing this Note . . . . These expenses may include, for example, reasonable attorneys' fees . . . ."

The trust deed also included an attorney fee provision, Paragraph 7, which stated: "If: (A) I do not keep my promises and agreements made in this Security Instrument, or (B) someone, including me, begins a legal proceeding that may significantly [a]ffect Lender's rights in the Property (including but not limited to any manner of legal proceeding in bankruptcy, [i]n probate, for condemnation or to enforce laws or regulations), then Lender may do and pay for whatever it deems reasonable or appropriate to protect the Lender's rights in the Property. Lender's actions may include, without limitation, . . . paying reasonable attorneys' fees . . . . [¶] I will pay to Lender any amounts which Lender advances under this Paragraph 7 . . . ."

II

PROCEDURAL BACKGROUND

Lewis filed this action against defendants,[1] asserting causes of action: (1) to invalidate the notice of default, (2) for specific performance of a contract to buy defendants' claims under the note and deed of trust for $323,000, (3) for "predatory lending practices," and (4) for an injunction against a trustee's sale.

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[1] Quality Loan Service Corp. was also named as a defendant, but it filed a declaration of nonmonetary status. This meant that it disclaimed any involvement in the action other than as trustee and it agreed to be bound by any judgment. (Civ. Code, § 2924*l*.)

Defendants rescinded the notice of default, so the first cause of action never went to trial. After a bench trial, the trial court ruled against Lewin on the remaining causes of action. It found, alternatively, that: (1) the alleged contract was never formed; (2) the alleged contract was unenforceable under the statute of frauds; and (3) Lewin never tendered the alleged consideration. It entered judgment accordingly.

Defendants filed a motion for $95,637.50 in attorney fees. They argued that they were entitled to contractual attorney fees based on the attorney fee provisions in the 2005 note and trust deed.

In opposition, Lewin argued that he was seeking specific performance of an entirely new and separate contract, formed between him and defendants in 2012, which did not have an attorney fee provision.

In reply, defendants argued that the alleged contract would have constituted a modification of the note and trust deed because it would have reduced the payoff amount.

At the hearing on the motion, the trial court indicated that it was inclined to deny it. After hearing argument, however, it took the motion under submission. It then granted the motion, without stating any reasons.

III

MODIFICATION OF THE NOTE AND TRUST DEED

Lewin contends that defendants were not entitled to attorney fees because this was not an action on either the note or the trust deed.

"An order granting or denying an award of attorney fees is generally reviewed under an abuse of discretion standard of review; however, the "'determination of whether the criteria for an award of attorney fees and costs have been met is a question of law.'" [Citation.]" (*Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 669.)

Civil Code section 1717, subdivision (a) provides that "[i]n any action *on a contract,* where *the contract* specifically provides that attorney's fees and costs, which are incurred to enforce *that contract,* shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Italics added.)

Here, Lewin sued on a contract allegedly formed in 2012. That contract did not say anything about an award of attorney fees and costs. Defendants contend, however, that the 2012 contract constituted a modification of the note and the trust deed, and therefore it incorporated the attorney fee provisions in the note and trust deed.

This ignores the difference between *modification* of a contract and *assignment* of a contract. An assignment treats the underlying contract as a form of property (see 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 707, pp. 793-794), which can be transferred without altering the property itself. Here, if defendants did agree to sell the note and trust deed to a third party for a discounted amount, the note and trust deed would not be modified in any way; they would still be enforceable according to their terms. In particular, the payoff amount would remain the same; it would simply

become payable to the third party rather than to defendants. Defendants would receive a discounted amount, not because the payoff amount was modified, but because they agreed to accept the discounted amount in exchange for their rights under the note and trust deed.

We therefore conclude that this was not an action on a contract containing an attorney fee provision.

IV

OTHER GROUNDS FOR AFFIRMANCE

This brings us to whether there are any other grounds for affirmance.

The trial court did not state any reasons for its ruling. We may uphold that ruling if it was correct for any reason. "'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Indeed, even if the trial court stated erroneous reasons, "[a] trial court decision will be upheld even where it is based on an incorrect rule of law, as long as a sound basis for the decision exists." (*In re Marriage of Klug* (2005) 130 Cal.App.4th 1389, 1393.)

In our tentative opinion (see Ct. App., Fourth Dist., Div. Two, Internal Operating Practices & Proc., VIII, Tentative opinions and oral argument), we suggested that the ruling could be upheld on the theory that the attorney fee provisions in the note and trust

deed were so broad that they provided a right to fees in an action on the entirely separate subsequent contract. We recognized that, under Civil Code section 1717, contractual attorney fees can be awarded only in an action on "the contract" containing the attorney fee provision. However, we reasoned that defendants had a right to attorney fees under Code of Civil Procedure sections 1021 and 1032 that was not similarly limited.

At oral argument, Lewin took the position that, in an action on a contract, Code of Civil Procedure sections 1021 and 1032 do not apply, and any claim for attorney fees is governed by Civil Code section 1717. We called for supplemental briefing on this issue.

It turns out that there is authority supporting Lewin's position. For example, it has been generally stated that "'[i]n contract actions, Civil Code section 1717 governs attorney fee agreements.' [Citation.] '[Civil Code] [s]ection 1717 is the applicable statute when determining whether and how attorney's fees should be awarded under a contract.' [Citation.]" (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 356, and cases cited.)

Lewin relies primarily on *Santisas v. Goodin* (1998) 17 Cal.4th 599. In *Santisas*, the purchasers of a home sued the sellers, asserting both contract and noncontract causes of action. However, the purchasers voluntarily dismissed the action before trial. (*Id*. at p. 603.) The sellers then sought to recover their attorney fees under an attorney fee provision in the purchase and sale agreement. (*Id*. at pp. 603-604.) Civil Code section 1717, however, specifically provides that, when an action is voluntarily dismissed,

"'there shall be no prevailing party for purposes of this section.'" (*Santisas v. Goodin*, *supra*, at pp. 602, 610, 615, 617.)

The Supreme Court acknowledged that "this action is outside the ambit of section 1717 insofar as it asserts tort claims." (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 615.) However, it held that "[u]nder section 1717, . . . the seller defendants are not 'part[ies] prevailing on the contract' and may not recover the attorney fees they incurred in the defense of the contract claim." (*Ibid.*)

Justice Baxter, writing separately, argued that the sellers were entitled to attorney fees on their contract claim under Code of Civil Procedure sections 1021 and 1032, and therefore the restrictive definition of "prevailing party" in Civil Code section 1717 was not controlling. (*Santisas v. Goodin*, *supra*, 17 Cal.4th at pp. 624-631 [conc. & dis. opn. of Baxter, J.].) Or, as the majority summarized this argument, Civil Code "section 1717 . . . operates only to *permit* recovery of attorney fees that would not otherwise be recoverable as a matter of contract law and never to *bar* recovery of attorney fees that would otherwise be recoverable as a matter of contract law." (*Id.* at p. 616.)

The majority responded: "We reject this construction of [Civil Code] section 1717 . . . ." (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 616.) "[W]e construe subdivision (b)(2) of [Civil Code] section 1717, which provides that '[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section,' as overriding or nullifying conflicting contractual provisions, such as provisions expressly allowing recovery of attorney fees in

the event of voluntary dismissal or defining 'prevailing party' as including parties in whose favor a dismissal has been entered. When a plaintiff files a complaint containing causes of action within the scope of section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees*." (*Id*. at p. 617.)

Defendants argue that "*Santisas* is not relevant" because in this case there was no voluntary dismissal and "[t]here is no dispute that [defendants] are the prevailing parties." However, besides limiting the definition of "prevailing party," Civil Code section 1717 also limits the recovery of contractual attorney fees to actions on "the contract" containing the attorney fee provision. And under *Santisas*, Civil Code section 1717 can bar the recovery of contractual attorney fees that would otherwise be available under Code of Civil Procedure sections 1021 and 1032, even when the terms of the relevant contract would otherwise authorize recovery of the fees. It follows that Civil Code section 1717 is controlling here and that it bars an award of attorney fees.

We pause to emphasize what defendants are *not* arguing. They are not arguing that *Santisas*'s *reasons* for its holding with regard to the "prevailing party" limitation do not apply to the limitation to actions on "the contract"; they do not even discuss those reasons. Nor are they arguing that the "prevailing party" limitation of Civil Code section 1717 is distinguishable on any other grounds. We deem these arguments forfeited and

we express no opinion on them. Indeed, defendants forfeited the entire argument that we outlined in our tentative opinion by failing to raise it in their respondent's brief; because they have not shown good cause for their failure to raise it earlier, we may conclude that raising it in court-ordered supplemental briefing was not sufficient to preserve it. (*Sciarratta v. U.S. Bank National Association* (2016) 247 Cal.App.4th 552, 560, fn. 6.)

We therefore conclude that we cannot uphold the trial court's ruling on the theory that the attorney fee provisions in the note and the trust deed were so broad as to apply to an action on a separate contract.

V

DISPOSITION

The order appealed from is reversed. Lewin is awarded costs on appeal against defendants.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

CODRINGTON
J.